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No.

IN THE

Supreme Court of the United States

JANET CHANG,

Petitioner,

-against-

FIRST AMERICAN TITLE INSURANCE CO. OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does "Equal Protection" apply equally to "all" citizens - poor, rich, plaintiff, defendant, all tenant-in-common, etc., besides the named "suspect" classes, (e.g. race, color, etc.)? Does the court have the duty not to aid the aggression of the rich and powerful against the little people? Whom can the little people rely on for protection of his/her property, right to contract and the right to pursuit happiness, if not the court?

2. In making decision to grant subrogation right, is it equitable and against public policy for a court to disregard a service provider's inequitable conduct, should the court consider granting such a right under the rules governing the claimant's role as a service provider? Does the right of equal protection entitles the defendant to a counter-claim against the claimant's inequitable interference into the defendant's property and contract right?. Is it in the public interest to condemn all inequitable conduct and prohibit a wrongdoer from making a large profit from its own wrong - so as to deter future delinquency?

LIST OF PARTIES

(a) Parties appear in the caption of the case on the cover page:

1. First American Title insurance Co. of New York - substituted as plaintiff

2. Janet Chang - defendant

(b) Parties not listed in the caption of the case on the cover page, but are parties to the proceeding in the court whose judgement is the subject of this petition:

1. Great Eastern Bank of Flushing - the original plaintiff (mortgagee) who was replaced by First American Title Insurance Co. of New York (delinquent title insurer - remaining sole plaintiff)

2. Steven Chang - the defaulted borrower (mortgagor) who did not make appearance in the proceedings

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Janet Chang, defendant and a pro se lay litigant respectfully petitions for a writ of certiorari to review the judgement below.

OPINIONS BELOW

The opinion of the N. Y. State Supreme Court, Appellate Division, Second Dept., appears at Appendix C to the petition and it is not published. It was a dismissal without review of an appeal and issued no opinion on the district court's opinion. The district court's opinion appears at Appendix D.

The Court of Appeals of State of New York denied permission to appeal to that court and denied a motion for rehearing. The orders appear at Appendix A and B.

STATEMENT OF JURISDICTION

This court has jurisdiction to consider this petition by way of Writ of Certiorari, and to decide this matter, pursuant to 28 U.S.C. Sec. 1257(a).

The date on which the N. Y. State Court of Appeals denied motion for permission to appeal was Dec. 20, 1999. A copy of that decision appears at Appendix B.

A timely petition to the Court of Appeals for rehearing was thereafter denied on Feb. 29, 2000. A copy of the order denying rehearing appears at Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

1. U.S. Constitution, Fourteenth Amendment, Sec. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty without the due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

2. New York State CPLR Article 32, R. 3212, On Summary Judgement:

(b) Supporting proof; grounds; relief to either party. A motion for summary judgement shall be supported by affidavit, by a copy of the pleading and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts, it shall recite all the material facts, and shall show that there is no defense to the cause of action or defense has no merits. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgement in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgement, the court may grant such judgement without the necessity of a cross-motion.

* [Subd(c): Immediate trial]

3. N. Y. State Insurance Law Sect. 1113[a][18]: Title insurance means insuring owners of and other persons fully interested in, real property and chattels real against loss by reason of defective titles and encumbrances and insuring the correctness of searches for all instruments, lien or charges affecting the title to such property, including power to procure and finish information relative thereto, and such other incidental powers as and specially granted in this chapter.

4. N.Y. State SCPA Sec. 1903, Limitations

(3) A proceeding under this article to satisfy a legacy expressly or impliedly charged on the real property must be instituted within 10 years from the date of death of the decedent.

STATEMENT OF THE CASE

This appeal is not only to seek amelioration from the result of a miscarriage of justice, it is also to illustrate how a rich title insurer can hire a high-priced specialist to take advantage of the ambiguity in title insurance law and procedural complexity to defeat a "little people" who could not afford to pay lawyer. First American Title Insurance Co. of New York profited by over $180,000 from its erroneous certification that Steven Chang (one of two owners under tenant-in-common) was a sole owner; Great Eastern Bank, negligently relying on it, paid off the two-owners' purchase money mortgage of $85,000 and granted an imprudent loan of $250,000 to Steven Chang - with actual notice from the title search report that he was not the sole owner. The bank incurred a large loss when Steven defaulted. Title insurer settled with the bank in the amount of $195,000, went on to collect the bank's entire claim of $386,246; while the non-participating co-owner's widow (who expressly objected to any refinancing or interference into her mortgage contract) lost her property without adequate compensation. Her property and contractual rights had in effect not received the equal protection of the law.

The forfeiture of the defendant's right to be vindicated in a State appellate court is a display of a different kind of inequality - that all the so-called "mistake" by bank and title insurer (which is actually a breach of legal duty), or error in a judgment were excused; yet a *pro se* lay defendant's inadvertent mistake of missing a deadline by 7 days (because of a serious car accident) was not forgiven. I hope the Court will find in a review of this case, the issues, plaintiff's manipulation and my hardship some

insight for progress in democratic endeavor to protect the "little people" so that they could safely hold on to whatever little possessions they have; it will also prevent future miscarriage of justice and protect the integrity of the court.

The subject property was purchased under the names of petitioner's late husband Hsu Chang and his youngest brother Steven, having a mortgage of $90,000 with Long Island Savings Bank (hereafter as LISB). After Hsu died, without my knowledge and consent Steven took a $250,000 loan from Great Eastern Bank (hereafter as GEB) who placed a mortgage encumbering the entire property. As a condition for giving the loan, GEB issued a bank check and required Steven to pay off a $85,138 balance of LISB mortgage. As I had written 2 letters to LISB objecting to refinancing, LISB refused to give assignment of the mortgage and allowed GEB to discharge and extinguish its mortgage. As soon as I found out, I directed the attention of GEB and First American Title Insurance Co. of New York (hereafter as FATIC) to the impropriety of their action. GEB declared in a letter [R 227] that if any loss arisen from the mortgage, it would be for the title insurer to indemnify it as it relied on the title insurer's certification that Steven was the sole owner, and the insurer had omitted all exceptions related to Hsu's Estate. FATIC stated that it was a matter between itself and its insured. [R 226]. Among pages of closing documents was a showing [R 211] of FATIC agent's omitting the exceptions requiring proof from Hsu Chang's family showing death intestate, and waived claim for the lien of debt against Hsu Chang's estate. GEB & FATIC's words and conduct led me to take no action, I trusted that a claim for the lien was expressly waived and estopped them from making it in the future.

When Steven defaulted, the FATIC retained its long time defender Dollinger, Gonski & Grossman (as Grossman) to foreclose on behalf of GEB on Steven and me. Steven did not appear. GEB's motion for Summary Judgement was granted on

the ground that GEB had paid my LISB debt by mistake and I was unjustly enriched, in spite that my lawyer's answer and opposition offered defenses and counter-claim [R 81] together with many documents as supporting evidence, which included, among other things, that (a) I did not know or approve Steven and GEB's action; (b) I had earlier written letters to LISB to prevent the LISB mortgage to be refinanced away (I need the integrity and privilege of that mortgage to protect my property); (c) the title search report and closing documents all indicated that GEB knew or should know of my rights and objection, GEB relinquished an assignment of mortgage and waived the claim against Hsu Chang estate at the closing; (d) GEB wrote to N. Y. Banking Dept. that it relied on FATIC's certification that Steven Chang was the sole owner, any loss arisen from title defect it would look to its title insurer for indemnification, and FATIC declared the mortgage was a matter between itself and the insured. These showing should be sufficient to preclude summary judgement.

With knowledge of my rights and my opposition, a discharge of my mortgage was an voluntary payment and interference into my protected contract right under 14th Amendment of Constitution. Yet the court ordered: (i) that the answer, affirmative defense and counter claim asserted by the defendant Janet Chang be stricken; (ii) that the interests in the subject owned by mortgagors Steven H. Chang and Janet Chang shall contribute equally to the repayment of the equitable first mortgage lien in the sum of $85,138.30 which the plaintiff Great Eastern Bank has heretofore paid to the Long Island Savings Bank; iii) that after payment of the equitable first mortgage lien the monies due and owing by Steven Chang to Great Eastern Bank on the second mortgage be paid out of the remainder of Steven H. Chang's interest in the subject property. My lawyer told me that FATIC demanded that I must pay the whole amount of so-called "equitable lien (grown into $200,000 by 1995) for my property interest to be released from being auctioned off.

My lawyer appealed and failed. He resigned shortly after, because I could no longer keep up paying legal fees. He did not oppose FATIC's substitution as plaintiff nor its subrogation to claim the full amount of GEB's loss. Fearfully I struggle on my own to continue. Old age, stress, a broken right wrist and a growth near the throat, surgeries and slow healing all added to the confusing and hindered the torturous progress in the case.

When I discovered that FATIC had only paid $195,000 - (not the full loss nor the insured amount), I realized the appearing of FATIC into the action as plaintiff exposed itself to a direct assertion of defense against which could eliminate/reduce its claim, also an insurer's subrogation must be determined under the rules governing insurers. I offered new evidence and made new motion requesting the district court to modify the early decision where many issues were not considered, e.g. FATIC did not pay in full; title insurer's subrogation right must pass the test by the rules governing the insurer; FATIC was subjected to assertion of comparative fault, etc. The court did not consider the new issues or FATIC's fault in causing the bank's loss, denied the motion and gave up a chance to hold the true culprit responsible.

The judgement's not fixing a reasonable price for a release of my share of the LISB lien allowed Grossman to insisted that I must pay the entire so-called "equitable lien" (half was Steven's share, it had grown to $225,000 in 1999) to stop the auction off of my interest. As the over-encumbrance of Steven's loan on the entire property (which clouded my title) plus Steven's default and GEB's foreclosure added more force to ravage my credibility and thus precipitated my inability to get bank loan to pay all at once the demanded $225,000. The Referee's computation as drafted by Grossman contained errors including a wrongful calculation of the interest charge. I challenged it but no correction was made, nor did the referee make an effort to investigate the feasibility of selling in parcels (RPAPL Sec.

1321). Value of Steven's half interest was more than sufficient to cover the $195,000 FATIC paid out.

My emergency Order to Show Cause was filed one month before the auction, the court decided on Jan. 5, 1998 (one month after the Dec. 4th auction) showing a recognition of unconsidered issues yet denied modification. Before the Dec. 4, 1998 auction, Grossman rejected my offer of $91,000.00 borrowed funds and a promise to produce in 2 to 3 working days the balance of $210,000 FATIC demanded. My joining in the bidding was cut off by Referee, because my certified check was not made to Referee's name. I was informed recently that my large enough equity in the property should have allowed me to bid much higher without a 10% deposit requirement. The purchaser later said he was prepared to bid much higher, up to $750,000. The property could be sold for much higher than $555,000 which was way below market price.

I did retain a second lawyer right after the auction, unfortunately his past association with the plaintiff-insurer tempered his zest in making good of his promise to me which created a conflict of interest. He spent lots of time coming up with computations to convince me to accept a very low offer. After a first retainer of $5,000 and agreed to charge me monthly, he required a $20,000 additional retainer in March which I could not come up quickly all at once. On April 17, 1999 a serious car accident and injuries (including concussion, neck pain, noise in the ear) added more confusion; I missed the May 4, 1999 deadline for perfecting the appeal to Appellate Div., 2nd Dept. by 7-days, the motion to enlarge time was denied. Ignorant of the consequent and under distress, I made a motion for reargument, the denial of which resulted in Court of Appeals' lack of jurisdiction to review on the ground the order was not a final judgement.

FATIC was not content to merely collecting $373,670.50 from the sales proceeds when it only indemnified GEB with

$195,000. Although the Referee's report indicated zero deficiency, FATIC tried squeezing $12,576.43 from the meager funds in the Receiver's account in a proceeding where I had to face 3 tough lawyers - Grossman, receiver, and the receiver's attorney charging fees to property although an insurer appeared to have been retained the Receiver's lawyer. Whatever little is left for me is subject to tax when I accept it; there would not be enough to buy even a one-bedroom condo in the same area.

REASONS FOR GRANTING THE PETITION

Only a Supreme Court review could provide me a last chance to have a meaningful opportunity to defend myself against the erroneous summary judgement. The Appellate Div. Second Dept. denied reviewing because of a car accident led to my missing the deadline by 7 days. It should be noted here that the Second Dept. has a deadline of only 6 months, 3 months shorter than the 9 months allowed by the First Dept. Court of Appeals too denied review. I have no other remedies. Being forced to continue a litigation which I have had no training, all through the long, hard struggle, I have not given up hope. I have faith in the system which provides a fair review to ameliorate injustice.

"This reexamination of a question where **justice demands it,** is the finest common-law tradition...." (Woods v Lancet, 303 NY 349, 355). The majority in the case of MLB v SLJ, 117 S, Ct, 555, citing Griffin v Illinois 76 C. Ct. 585 to affirm the Court's recognition of the importance of appellate review to a correct adjudication of guilt or innocence; it signified that to deny adequate review to the poor means that many of them may lose their life, liberty or property because unjust convictions which appellate courts would set aside. The lay litigants who are forced (by lack of money) to defend themselves need help. Please take note of the remarks by the court in McFarland v Amer. Broadcast. Co. 623 F. Supp. 1334, "Party's right of self-

representation implies an obligation of court to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." And "The due process of law which 14th Amendment exact from the State is a concept of fundamental justice and is not satisfied by merely formal procedural correctness" (People v Dugan, 82 NE 2d 482,484). I pray for something to stop the trend of turning a lawsuit into a contest of who could afford a better lawyer. To achieve true equal protection, I plead for the Court to make judgement from what the learned minds could draw from the wealth of their own knowledge, not to base merely on two sides' arguments; especially when a pro se lay defendant had to contend with a high-power lawyer who had superior knowledge in an specialized area of law such as title insurance. The untrained pro se defendant, being forced to defend himself with no proper training or adequate assistance, is lost in the complicated procedural requirements and drowned in the sea of legal theories, cases and books.

Our society is based on democracy, equality and justice for all, not on the bases of survival of strongest, smartest, or the richest, etc. The little people must be allowed to preserve whatever small possessions they have. "There is no justice where the kind of trial a man gets depends on the amount of money he has" (Griffin v Illinois 76 S. Ct. 585; see also MLB v SLJ, 117 S, Ct, 555). We Americans must not encourage or perpetuate such a condition of inequality.

The service of mortgage and title insurance is essential and widespread; mistake in the transaction not only may throw a owner or a borrower into litigation, often result in their losing homes and shelters which are fundamental in people's lives. Little has been written clearly on title insurance which is different from insurance in general as many federal and state courts viewed it as a "warranty". Mr. Archbald Cox remarked in his book "Court and Constitution" that behind the generalities

and abstractions of statues and legal doctrine lie the individual man and woman whose live the law poignantly affects (NLRB v Jones & Laughlin Steel Corp. 301 U.S. 1)." Stated the court in Williams v Bright, 632 NYS2d 760, "By recognize the special condition of one litigant, we may individualize Justice". The knowingly discharging the LISB mortgage would be harmless if Steven and me had same desire for refinancing, or I approved or ratified his action. When the need and goal of the two mortgagors were not the same, it was for the two to work out among themselves. A bank, with knowledge, should not participate in, nor encourage or induce the would-be-borrower's breach of fiduciary duty. A closer look and a clearer and direct ruling on this narrow situation can point the way to resist the distorting effect of generality which the banks, borrowers, title insurers, even the court need to be cautioned of. It could prevent their injurious conduct; or to spare, after a bad transaction occurs, a poor defendant from wasting a lot of time and money for a lawyer to search and to uncover some obscure legal theory since no two identical cases exist; and to prevent making wasteful inappropriate or unhelpful pleading. It could prevent a defendant's running out of money too soon as to become unable to finish a litigation or being forced into an unjust settlement. All the above would be one of the ways to help the poor and uneducated. It makes good sense to save the courts' time and resources by reducing the need for appeals - often brought on by ambiguity and confusion.

POINT I.
VIOLATION OF FOURTEENTH AMENDMENT

'The right of private property is a fundamental, natural, inherent and unalienable right" (New York Committee Against Discrimination v Pelham Hall Apt., 170 NYS2d 750. It was referred to as a "sacred right" in Taylor v Porter, 4 Hill 140. It was said that the law "assures to every person his day in court and an opportunity to be heard and to defend and preserve his

rights by establish any fact which under the law, would be a protection to him or his property" (City of Buffalo v Hawks 236 NYS 89, 93). And "Constitutional liberty implies the absence of arbitrary restrain" (People by Van Scharck v Title & Mortgage Guar. Co. 264 NY 69). "Included within the concept of liberty....to enter into all contracts that may be proper, necessary and essential to carry his purpose to a successful conclusion" (Inves v South B. R. Co. 201 NY 271; Montgomery v Daniels 378 NYS2d 1).

"Foreclosure is the judaical act invoked by one party to compel the other party to fulfill his mortgage agreement. The judicial act when invoked irrevocably cuts off beyond the possibility of recall the mortgagor's right." (Harlem Sav. Bank v Cooper, 101 NYS2d 641). "The action itself is equitable in its nature, although it is based on legal rights, and it is the province of a court to see to it that a party invoking its aid shall have dealt fairly before relief is given". (Germania Life Ins. Co. v Potter, 109 NYS 435; Baldwin Bellmore Fed. Sav. & Loan Ass'n v Stellato 287 NYS2d 516). A financially handicapped person runs more risk in being victimized, yet has less ability to defend his property and contractual rights. There is need for more effective measure to insure better protection.

THE DEFENDANT WAS DEPRIVED OF A FULL, FAIR AND MEANINGFUL OPPORTUNITY TO DEFEND ONE'S RIGHT

In Boddie v Connecticut, 91 S. Ct. 780, the court stated that persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. The hearing must be a meaningful time in a meaningful manner (Armstrong v Manzo 380 U.S. 545). "Due process of law implies a conformity with natural and inherent principle of justice" (Holden v Hardy 18 S. Ct. at 387). No amount of procedure or technical correctness can justify unjust result.

The order [R 4] granted GEB the foreclosure right was arrived without a trial, although triable issues were raised. New evidences was offered and new issues raised in new motion request modifying the early summary judgement after the delinquent title insurer became the sole plaintiff. Yet no modification was made in the final judgement [R 336]. This petition to the highest Court in the land is made with a hope that the Court will review and ameliorate an unjust result which is repugnant to the Constitution as there were no meaningful investigate, trial or review to determine whether GEB had dealt fairly with the defendants; and FATIC should not be allowed automatically to be subrogated to foreclosure right without the test by the rules which insurers must follow, especially when GEB's loss could be said to be directly caused by FATIC's wrong.

Under CPLR 3212, motion for Summary Judgement is to be denied if any party shall show facts sufficient to require a **trial** of any issue of fact. There were two claims against two defendants under different cause of action. Steven did not appear to dispute the claim against him. But my lawyer raised triable issues e.g. GEB's knowingly intruded into my mortgage, voluntarily paid my debt; he made a good showing of many documents to dispute GEB's claim against me. The GEB did not refute, it only made a conclusory statement (no proof or explanation) that it was a mistake. Summary judgement is a drastic decision,

> "Issue finding, rather than issue determination, is the key to the procedure...." (Estave v Abad 68 NYS2d 322).

> "If the judge has any substantial doubt as to what a given material fact is, or can reasonably conclude that the fact is "arguable", the motion must be denied." Barrett v Jacobs 255 NY 520)

"Defenses warranting **trial** where defendant had show bona fide defense of substantial character sufficient to entitle it to trial of issues, it was error to grant summary judgement" (Jaymax Precision Products, Inc. v Ship Tank Service Marine Corp. 165 NYS2d 133).

"The word **trial** connotes decisions on the evidence and argument properly advanced in open court (Bridges v State of Calif., 62 S. Ct. 190, 197).

In contrast to our case, the court in First American Title Insurance v Kevlin 610 NYS 2d 361 (A.D. 3 Dept.) denied summary judgement against both cotenant indiscriminately; and the Appellate Div., Third Dept. granted summary judgement against the borrower alone, in recognition of the separate rights of 2 cotenant with disparate interests and to treat them equally.

INDIVIDUAL RIGHTS ENTITLED TO PROTECTION BY CONSTITUTION

The plaintiff's complaint claimed that I, "Janet Chang" defaulted on its mortgage when I took no part in the transaction. Steven could have taken a smaller second mortgage in keeping with his equity interest so as not to injure my right. The bank must not participate in or encourage Steven's breach of fiduciary duty. Two owners as tenant-in-common, if one oppose or did not approve the other's action, the wrong of the other party should not be a cause to destroyed the non-consenting owner's right.

"A tenant-in-common who does nothing to mislead a third person, or whose conduct is such as to warrant a 3rd persons reliance thereon, is not bound by the unauthorized acts of his co-tenant." (First Nat's Bank v Morgan 112 NW 2d 26.)

The court in First American Title Insurance v Kevlin 610 NYS 2d 361 (A.D. 3 Dept.) had no difficult to recognize that the lender and subsequent substituting plaintiff FATIC (the same title insurer in our case) both having no foreclosing rights against the owner who took no part in the mortgage. In denying Household Finance's motion for summary judgement to foreclose against both owners, the court forced the plaintiff to request an order severing its claim against the non-consenting cotenant. The Appellate Div. 3rd Dept. modified the order to grant a summary judgement against the borrower alone, the title insurer inherited only the right to foreclose on the borrower and receive an undivided interest. The court, citing V.R. W. Inc. v Klein, 68 N.Y. 2d 569; Schwab v Krauss 566 NYS 2d 974; Money Store/Empire State v Lenke 542 NYS2d 174, stated:

> "a conveyance by one tenant, to which the other has not consented, cannot bind the entire fee or impair the non-consenting tenant's interest, and the foreclosing mortgagee acquire only an **undivided interest** held by the borrower. (V.R.W. Inc. v Klein, Supra, 68 N.Y. 2d at 564).... Accordingly, upon the severance of this action, the foreclosing mortgagee would only acquire that interest held by Joseph Kevlin."

By comparing the two cases both involving the same title insurer FATIC, we see that a just result can only be reached when the court (and the mortgagee) recognizing a non-consenting owner's individual right and extends equal protection to that right, and to prohibit a mortgagee's claim against one cotenant's wrong to reach over and destroy the rights and privilege of the other.

INTERFERENCE OF EXISTING CONTRACTUAL RIGHT

GEB's officious discharge of my mortgage was an infringement of my freedom - to hold on to my existing contract

necessary to carry out my purpose of owning a property; and GEB's foreclose without my having a full and meaning opportunity to defend was a deprivation of my private property and contractual right without due process of law.

The elements required for recovery for interference of existing contract right (as cataloged in Laura Holiday Co. v Smith Barney, 88 NY 2d 413), were all present in this case.

1. A valid contract with a third party existed, LISB mortgage;

2. GEB had knowledge of the existence;

3. GEB's intentionally (with knowledge as well as an self-interest to become a first mortgagee) procurement of a breach is sufficient to impose liability when it led to

4. the actual breach of the contract;

5. which resulted in abridgement of my privilege (being allowed to perform my duty and achieve my goal in installment payments), waste of money in litigation, time and pain and loss of property. **If were not for GEB's interference** into my mortgage contract, I would be able to pay off my mortgage debt in small monthly installment, living in one unit and renting out another and owning free and clear by 2009 an half interest (2 units) of a most desirable and valuable property perhaps doubling in price the 1999 knocked-down auction price with 10 years rent free living.

In NBT Bancorp v Fleet/Northern Star Fin. Group, 641 NYS 2d 581, Chief Justice Judith Kay ruled that with respect to contract for a definite term, persuasion to breach alone as by an offer of a better term, has been sufficient to impose liability (Gonzales v Reichthaler, 233 NY 607). Recovering damage for tortious interference with contractual right would be permitted

even if the party interfered was engaged in lawful behavior. She Quoted Guard-life v Parker Hardware 428 NYS2d 628 which stated "Generalization must be refused in this context to achieve a balancing of the protection of interest of one party's enjoyment of contractual performance and society's interest in respect for the integrity of contractual relationships.... Respect for individual contract rights outweighs the public benefit to be derived from unfettered competition."

GEB's self serving discharging of my debt over my objection makes GEB liable for my loss.

> "One who intentionally and improperly interferes with the performance of a contract. . . between another and a third person by inducing or otherwise causing the third person not to perform the contract or by preventing the other from performing the contract or causing his performance to be more expensive or burdensome is subject to liability to the other for the loss resulting from [his acts]." (Restatement, Torts, Sec. 766 & 766A)

THE ELUSIVE EQUAL PROTECTION

In Yick Wo v Hopkins, 118 U. S. 356 the Supreme Court stated "equal protection and security should be given to all underline circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursuit their happiness and acquire and enjoy property". In a democracy, the courts are the ultimate refugee for the citizens for vindication of their rights and liberty. Denying of my right to a full and meaningful opportunity to defend and to have a review to correct an erroneous ruling is the equivalent of deprivation of my fundamental right. To offer some assistance to a defendant who could not afford counsel was merely to give substance to a constitutional promise of equal protection, it is not giving away something which the defendant does not already have. In

Cochran v Kansas, 316 U.S. 255. It was held that a State which permitted an appeal in that type of case could not withheld it from one still comport with the standards of equal protection. The principle of equality should applied to all accused, whether it be in criminal or civil case. Substantial due process refers to a set of rights considered fundamental, even though they are not explicitly articulated in the bill of rights. This concept applies to the cutting off of my right to a review of the district court's erroneous judgement. Justice Sutherland "Even the intelligent and educated lay man has small and sometimes no skill in the science of law.... He is unfamiliar with rules.... He lacks both the skill and knowledge to prepare his defense even though he have a perfect one. He needs the guiding hand of counsel at every step in the proceeding against him because he does not know how to establish his innocence. (Powell v Alabama 287 U. S. at 69)

Aid to Criminal defendant who could not afford to pay lawyer had came about through advocacy and a proven need. The lack of aid for poor defendant in civil case has equally ruinous effect in its distorting a judicial decree and impairing the defendant's right in a deadly foreclosure case. The framers of Constitution placed no limitation on the types of people entitled to equal protection. The list of named suspect classes has expanded over the years, often precipitated by a heroic decision from this Court; it has not embraced wholly the group of poor. Many from this group could never reach the court. Their protection depends more on the good faith and good behavior of those with whom they have to become involved. The only effective protection for the vulnerable and unsuspecting poor is the deterrent effect of the court decision and the inhibitive power of penalty which will be most efficient in diminishing offender's errors and omissions.

POINT II.
THE CONFLICT OF DECISIONS; DISPARATE RESULTS

GEB'S DISCHARGE OF THE LISB MORTGAGE WAS OFFICIOUS, NOT BY MISTAKE NOR UNJUSTLY ENRICHED ME; IT INTERFERED WITH MY EXISTING CONTRACTUAL RIGHT AND DESTROYED MY PRIVILEGES

The LISB mortgage was not in default, nor matured, there was no threat or compulsion. GEB had no interest to protect prior to its officious interference, GEB's payment was voluntarily.

> "A payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid" (Mayor, etc., v Lefferman, 4 Gill 425, Brunagin v Tillinghast, 18 Cal 265; Mays v Cincinnati, 1 OHIO St. 268.)

King v Pelkorski, 20 NY2d 326 which plaintiff relied on is not controlling. Mrs. King, an unsophisticated individual, made a simple mistake in giving a loan to Joseph Pelkorski who had no right to mortgage a Trust interest of his wife; Mrs. King was truly ignorant of the intervening lien. The creditor's money was used to pay off debts on the jointly owned business, which was under threat. Mrs. Pelkorski's acquiescence in the mortgage placed by Mrs. King amounted to ratification. The creditor was not promptly informed, given a chance to rescind the contract as GEB was. As Mrs. King's mortgage was invalid for security, the court had to allow her the only available remedy - creating an equitable lien basing on mistake.

In our case, the greatest difference is that LISB mortgage was not an intervening lien nor was it unknown, in default or had matured (there was no threat); my share was a protected right

immune to any outside force's interference. I did not ratify GEB's paying it off. Only a very small part of the borrowed money was used to pay it.The GEB mortgage was valid against Steven's interest; the bank had also a claim against FATIC for an insured title defect. GEB and FATIC were professionals; and "A mortgagee takes with actual notice of an agreement shown on a title company report submitted to the mortgagee's attorney" (Warren Reed New York Real Property, Notice, Sec. 3.05: also Chelsea Exchange Bank v Weinstein, 226 AD 601, 236 NYS 185). GEB could not claim to be a bona fide purchaser without notice, the payment was not a simple mistake.

In Universal Title Ins. Co. v U.S., 942 F. 2d 1311, the court clarified the criteria for determine whether a mistake is 'excusable' for purpose of the doctrine of legal subrogation. Bank and title insurer both were said to be "professional enterprises experienced in the area of secured transaction involving real property", they must be held to a higher standard. Referring to Carl Peterson Co. v Zero Estates, 261 NW 2d 346, 348), the court stated,

> "Unlike the unsophisticated individual wholly unaware of a judgement lien. The bank is a professional lender with knowledge ....consistent with other jurisdictions, which have imposed stricter standards on professionals in context similar to the instant case. For example, the Washington Supreme Court distinguish between purchasers of real estate and a title insurer, noting that the former are bona fide purchasers to the extent that they were entitled to rely upon others who were paid to give an expert opinion and insure title. **The latter are engaged in giving those expert opinions for a consideration**. In equity, the purchasers and the title insurer are poles apart. (Coy v Raabe 418 P.2d 728.) .... It would be a gross misapplication of the doctrine of subrogation were we to hold that its cloak settles automatically upon one who has simply made a mistake, when it is a commercial transaction

> involving consideration. [The title insurer's] relationship is governed by the law of contracts. Further, **it is difficult to think of a situation in which a title insurance company could not claim unjust enrichment as to someone who might inadvertently benefit by their negligence.** Either they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation. [The insurer] has not cited us authority to the contrary."

GEB claimed in its Verified Complaint, ".... defendant Steven H. Chang, represented that he was sole owner of the subject premises at the time of the closing.... Plaintiff GREAT EASTERN BANK, would not have loaned the sum of $250,000 to defendant STEVEN H. CHANG, if it had known that said defendant was only the owner of a one-half interest in the subject premises." A bank is grossly negligent if it gives out $250,000 based merely on the say-so of the would-be-borrower. Putting the blame on Steven and me was obviously an afterthought and resorted to by Grossman; as 4 years earlier GEB had stated in a letter dated June 20, 1988 [R 227] to the N. Y. Banking Dept.,

> "Based upon the representation of the title company, Great Eastern Bank placed a mortgage in the amount of $250,000 on the entire property with Steven as the Mortgagor. If there is a title problem concerning the real property, it is the title company's responsibility."

GEB did not trust Steven, it had engaged FATIC to search and guarantee the title; it relied on title certification and the insurance. "One who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgement, rather than take the word of defendant (Puget Sound Nat. Bank v McMahahon 330 P.2d 559; Schmidt v Langield 169 NE 2d 229).

As I objected to refinancing of LISB loan [R 196, 197]; LISB duly complied with my request and refused to assign the mortgage to GEB [R 254], merely allow GEB to discharge it for the GEB's self-serving purpose. It is inferable from GEB & FATIC's words and actions that GEB's discharge of LISB mortgage was made with such understanding, and GEB also accepted that Steven was to be wholly responsible. At the closing, FATIC's agent marked "omit" to all exceptions pertaining to Hsu Chang [R 211], e.g.

> '**Omit**' Exception No. 14, "Proof showing date and place of death and heirship of HSU CHANG is required to be established by death certificate and affidavit from a member of decedent's family showing death intestate, without leaving a will, and setting forth complete family history and descent satisfactory to this company and containing an heirship clause."
>
> '**Omit**' Exception No. 15, "Except the lien of debts against the estate of Hsu Chang, deceased".

Later, after I discovered that my rights were infringed upon, I called GEB's attention to their misconduct. At the time I was supporting 3 children on a $13,000 annual salary of a entry level secretary, paying lawyer was out of the question. So I requested the intervention by N. Y. Banking Dept. GEB waived its right to claim again by letter dated June 20, 1988. [R 227]

> "Where the conduct of the payor, after discovering the mistake, amounts to ratification of the payment, or is inconsistent with its claim of right to recovery, there can be no recovery." (Jensen v Associates Discount Corp., 126 NYS2d 263, cited 70 CJS Sec. 157(a))
>
> "He who having knowledge of rights which he may assert, has failed to act, with the result that another has acted upon

the assumption that such rights do not exist or are not to be asserted, is estopped to assert them." (Greenfield v Denner, 6 AD2d 263, 175 NYS2d 918),

"Estoppel rests upon word or deed of one party upon which another rightfully relies and so relying changes his position to his injury" (Nassau Trust Co. v Montrose Concrete Products Corp. 451 NYS 2d 663).

Furthermore, SCPA Sec. 1903 stipulates that a proceeding to satisfy a legacy charged on particular real property must be brought within ten years of death. (See also Pedowitz' "Real Property Title" Sec. 5-57 stated). GEB waited more than 10 years to file foreclosure action to claim against Hsu Chang's estate.

I never received a penny from Steve or the property, nor had I one day's use of it; it is not unfair to make Steven pay for the LISB debt. Also I have not been unjustly enrichment because,

"Where a person officiously conferred a benefit upon another, the other is enriched, but is not considered to be unjustly enriched. The rule denying restitution to officious person has the effect of penalizing those who thrust benefits upon others and protecting persons who have had benefits thrust upon them (See Restatement, Restitution Sec. 112) .... in accordance of the principle that compensation for benefits conferred is denied to officious intermeddler or to persons who manifest no desire to have compensation." (Restatement, Restitution Sec. 2)

As stated in McGrath v Hilding 394 NYS2d 603,

"Enrichment alone will not suffice to invoke the remedial powers of a court of equity. .... Whether there is unjust enrichment may not be determined from a limited inquiry confined to an isolated transaction. It must be a realistic

determination based on a broad view of the human setting involved. (cf. Sinclair v Purdy, 235 NY 245; Janke v Janke, 366 NYS2d 910, aff'd 39 NY2d 786).... without regard to the plaintiff's conduct it cannot be determined whether Hilding's enrichment, if that it be, was in fact **unjust**.... The point is that no intelligent determination can be made unless all of the relevant facts are explored. Then, upon such exploration, a nice balance is required. None of that happened or was permitted to happen in this case."

GEB HAD NO RIGHT OF SUBROGATION AGAINST ME

In Application of Brooklyn Trust Co., Appeal of Oelbaum, 12 NYS2d 718, the court stated "Subrogation is never permitted where its application will work injustice." (Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137, 115 N.E. 465; Bell v Greenwood, 242 NYS 149); nor permitted when the payment is voluntarily made after a conscious deliberation and under no compulsion or threat.

'"The common principle is that if a man chooses to give away his money or to take his chances, whether he is giving it away or not, he cannot afterwards change his mind, but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice.' Add Cont. 1043; Alston V Durant, 2 Strobh. 257". (Swift & Courtney & Beecher Co. V U.S., citing Pollack, Principle of Contract, 523)

'The doctrine of subrogation is a pure, unmixed equity, having its foundation in the principles of natural justice, and from its very nature, never could have been intended for the relief or those who were in any condition in which they were at liberty to elect whether they would or would not be bound .... If one, with the perfect knowledge of the facts, will part with his money, or bind himself by his contract in a sufficient

consideration, any rule of law which would restore his money or absolve him from his contract would subvert the rules of social order." (Prairie State National Bank v. U.S. 17 S. Ct. 143; Insurance Co. v Middleport 8 S. Ct. 625, Gladsen v Brown, Speer, Esq. 37, 41)

The circumstances giving rise to denial of subrogation are:

"Where a person discharges an obligation owed by another, or a lien upon the property of another, and do so **officiously,** he is not entitled to reimbursement from the other (See Sec. 2), and is not entitled to be subrogated to the position of the obligee or lien holder. In such a case, it is true that as a result of the payor's act the other is enriched, but the enrichment is not unjust. This is true not only where the person making the payment did so with intention to make a gift to the other, but also where he intended to obtain reimbursement from the other, if the payment was officiously made." (Restatement, Restitution Sec. 162, **Comment (b))**

FATIC'S SUBROGATION RIGHTS MUST BE DECIDED UNDER THE LAW GOVERNING INSURER; DELINQUENT TITLE INSURER SHOULD PAY FOR ITS DELINQUENCY

Title insurance is insuring against loss by reason of defective title (Insurance Law Sect. 1113[a][18]). FATIC's liability to GEB sprang from its own breach of duty as a title insurer.

"In accordance with the general rules in suits involving an insurer's right to recover by reason of subrogation to, or assignment of, the rights of the insured, questions of fact must be submitted to the trier of facts." (Hamilton Fire Ins. Co. v Greger 246 NY 162, 158 NE 60, 55 ALR 921).

"... a defect arising from the rights of a person whose interest **appears in the chain of title** must be covered unless specifically excepted," Chrysler First Fin. v Chicago Title Ins. 595 NYS2d 302 citing Herbil Holding Co. v Commonwealth Land Tit. Ins. Co. 590 NYS2d 512.)

"Usually the very purpose and essence of the title insurance transaction is to obtain a professional title search, opinion and guarantee. The policy of title insurance is in the nature of a **warranty**." (Lawyers Title Ins. Corp. v research Loan & Inv. Corp., 361 F. 2d 764, quoting Empire Dev. Co. v Title Guar. & Trust Co. 225 NY 53). "Here we have held that knowledge is material" (Emp. Dev. Co. v Tit. Guar. & Trust Co., 225 NY 53)

"...the purpose of the **exception** is to protect the title company from having to cover losses...", (Herbil Holding v Com. Land Tit. Ins. Co. 590 NYS2d 512)

By certifying Steven as sole owner, not warning GEB of my rights and not excluding the known lien against Hsu Chang estate, FATIC failed miserably its duty as a title insurer.

"Indemnity and contribution are frequently available to tortfeasor. **Claims to subrogation are seldom**, if at all, **permitted to one whose conduct was tortious**. If any such right allowed would only be to the extent of payment made." (Brandner v Traveller Ins. Co. 587 P. 2d 933, 1978).

BUYER OF INSURANCE POLICY IS ENTITLED TO RELY ON IT GEB MORTGAGE DEBT WAS CANCELED, NO SUBROGATION FOR FATIC.

The court in King v the State Mutual Fire Insurance Co. 7 Cush., made a sound distinction between an insurance purchased **"by"** the mortgagee and **"for"** the mortgagee which

placed an obligation on the insurer to protect the mortgagor when the mortgagor paid for the insurance. Only Where a mortgagee insures solely for his own safety, and entirely at his own cost, the subrogation rights by the insurer may rise. (See also Foshee v Lloyd's New York, 619 F2d 1104).

> "If the insurer by paying the amount of the insurance policy to the mortgagee not only performs a contract with the mortgagee, but also discharges an obligation which it owed to the mortgagor, there is no subrogation right for the insurer. (Palisano v Bankers & Shippers Ins. Co. 84 NYS2d 637, aff'd 95 NYS2d 543.)
>
> "Such a right can only exist where equity demands its exercise. To allow it in the present case would, in effect, be to compel the insured to pay a premium without insurance, and to permit the insurer to exact a premium without risk." (Kernochan v N.Y. Bowery Ins. Co., 17 NY 436)

GEB was a beneficiary to receive the money from the policy purchased by the mortgagor. Steven the mortgagor paid a premium, was entitled to the benefit of having his mortgage paid and discharged. FATIC had no subrogation right (See (Palisano v Banbkers & Shippers Ins. Co. 84 NYS2d 637, aff'd 95 NYS2d 543; Hessian Hills Country Club v Home Ins. Co. 262 NY 189; (In Re SPG of Schenectady, Inc. 833 F. 2d 413). To do otherwise would be to allow the insurer to exact a premium from a mortgagor for an insurance that might not cover him and for which he would receive no benefit.

FATIC's $195,000 to GEB was in effect a payment on a policy purchased by the mortgagor to cover a risk not excluded and to relieve the mortgaged premises of the lien, it did not qualify as an "assignment" by FATIC's hollow claim that it had "purchased" the mortgage. Where the insurance is effected at the mortgagor's expense, the **proceeds apply towards reduction of**

the debt. (Norwich Fire Ins. Co. v Boomer, 4 Am. rep. 618; Adams v Allen, 19 So. 2d 578; Concord Union Mut. v Woodbury, 45 Me 447; Hartford Fire v Bleedorn, 132 S.W. 2d 1066; Leyden v Lawrence, 81 A. 121; Pheonix Assur. Co. v Allison, 17 S.W. 894.) It is illuminated in 78 NY Jur 2d, Mortgage, Sec. 325, that

> "Wherever a given transaction will be held, in legal effect, to operate as a payment and discharge, which extinguishes the mortgage, or as an assignment which preserves and keep it on foot, does not depend so much on the form of the words used as upon the relations subsisting between the parties advancing the money and the party executing the transfer or release, and their relative duties....If the money is advanced by one whose duty it is, by contract or otherwise to pay and cancel the mortgage, and to relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, the transaction will be held to be a release, and not an assignment, even though in form it purports to be an assignment (Merten v Wakefield 71 NYS 1062, 35 Misc 501.)"

Contrary to the Queens district court's decree, a buyer of the title insurance policy had the right to rely on the insurer, regardless of the fact that the buyer is not the beneficiary. A court discerningly termed the title insurer's money paid to insured **did not purchase note and mortgage** but rather merely satisfied its obligation under its title policy. (American Title Insurance Co. v M-H Enterprises, 815 P.2d 1219). Insurer's rights against the buyer of insurance are non-existent. There was no agreement stating otherwise in this policy.

Furthermore, Knowlton v Black, 1907, 102 Me 503, 67 A. 563 is applied here, "If the mortgagee accepted a smaller amount in full discharge of the mortgage debt, the mortgagor is fully released from further liability." Since Steven was to be

released from further liability, I should not be required to pay for Steven's share of the LISB mortgage. If the delinquent title insurer could only demand for me to pay a half of the LISB lien with correct interest, not the $225,000, I could have managed.

CONCLUSION

As both GEB and FATIC's claims in making me liable and their subrogation rights were contested, a foreclosure sale should not be allowed before there was a trial where I would have a full, fair and meaning opportunity to defend. Even if Steven was too ignorant and did not wish to spend money to contest his right, there was a "privity of estate" between me and the GEB/FATIC who intruded into my property and contractual rights and caused me great financial and mental suffering, my defenses should preclude plaintiff's claim to sell off my property.

In consideration of the above stated reasons, I pray that the petition for Writ of Certiorari be granted.

Respectfully submitted,

JANET CHANG,
Pro se Petitioner
947 Fox Meadow Road
Yorktown, NY 10598
(914) 245-9690

APPENDIX A - COURT OF APPEALS ORDER DENYING MOTION FOR REHEARING AND FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twentieth of December, 1999

Present, Hon. Judith S. Kays, Chief Judge, presiding

2-11 Mo. No. 171
First American Title Insurance Co. Of New York

Respondent,

V.

Steven H. Chang,
Defendant

Janet Chang, Appellant.

A motion for reargument of motion for leave to appeal to the court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

STUART M. COHEN
Clerk of the Court

APPENDIX B - COURT OF APPEALS ORDER DENYING MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-ninth of February, 2000

Present, Hon. Judith S. Kays, Chief Judge, presiding

2-11 Mo. No. 171
First American Title Insurance Co. Of New York

Respondent,

V.

Steven H. Chang,
Defendant

Janet Chang, Appellant.

A motion for leave to appeal to the court of Appeals in the above cause having heretofore been made upon the part of the appellant herein, and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

STUART M. COHEN
Clerk of the Court

APPENDIX C: N.Y. STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPT., DISMISSING THE APPEAL AND DENYING REVIEW OF LOWER COURT FINAL JUDGMENT OF FORECLOSURE AND SALE (THE COURT LAST ADDRESSED THE MERITS OF THE CASE)

GUY JAMES MANGANO, P.J.
CORNELIUS J. O'BRIEN
THOMAS R. SULLIVAN
GLORIA GOLDSTEIN, JJ

98-10381
First American Title Insurance Co. of New York,

Respondent

-against-

Steven Chang, Defendant
and
Janet Chang, appellant

Motion by the appellant pro se to enlarge the time to perfect an appeal from a judgement of the Supreme Court. Queens County, dated September 10, 1998.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied: and it is further.

ORDERED that on the court's own motion, the appeal is dismissed without costs or disbursements for failure to timely perfect the same.

MANGANO, P.J., O'BRIEN, SULLIVAN, and GOLDSTEIN, JJ.. concur.

ENTERED:

MARTIN H. BROWNSTEIN
Clerk

DATED: June 20, 1999

APPENDIX D - N.Y. STATE SUPREME COURT, QUEENS COUNTY FINAL JUDGMENT OF FORECLOSURE AND SALE

First American Title Insurance Co. of New York,

Plaintiff

-against-

Steven Chang, Janet Chang, et al
Defendant

This is a motion by the plaintiff in a foreclosure action for summary judgement, appointment of a referee to compute, and related relief. A cross-motion by the defendant Janet Chang to consolidate this action with a related action for the partition of the property has been withdrawn.

The defendant, Janet Chang, succeeded to her husband's one-half undivided interest in the premises which are the subject of this action upon the death of her husband, Hsu Chang. The remaining on-half undivided interest was and is owned by Hsu Chang's brother, Steven H. Chang. At the time of Hsu Chang's death, the property was encumbered by a mortgage loan owed to the Long Island Savings Bank. On February 9, 1987, the plaintiff loaned to Steven H. Chang the sum of two hundred fifty thousand dollars ($250,000). The loan was secured by a mortgage on the entire property. As noted, Steven H. Chang owned only a one-half interest in the property, Janet Chang, the owner of the other half, did not consent to the mortgage. At the closing on the mortgage, the plaintiff paid off the outstanding loan to the Long Island Savings Bank out of the proceeds of its loan to Steven H. Chang. The amount paid was eighty five thousand one hundred thirty-eight dollars and thirty cents

($85,138.30). Steven H. Chang has not paid the sum due on the loan by the plaintiff, and this action followed.

Plaintiff claims foreclosure not only as to the entirety of Steven H. Chang's interest, but also as to Janet Chang's interest, to the extent of the prior mortgage to the Long Island Savings Bank. As to this, it claims entitlement under the doctrine of equitable subrogation. In King v Pelkorski, 20 NY2d 326, the Court of Appeals adopted the formulation of the Restatement, Restitution Sec. 162, that "where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder."

Here, the mortgage to the Long Island Savings Bank was a lien on Janet Chang's interest in the premises. This lien was discharged using the plaintiff's money. In the court's opinion, it would be unjust to allow Janet Chang to retain the entire value of her interest, after the property is sold in foreclosure, free and clear of any obligation to repay that mortgage. Therefore, the court holds that the doctrine of equitable subrogation applied here, and Janet Chang's interest in the premises is available to satisfy the equitable lien created by the plaintiff's repayment of the Long Island Savings Bank mortgage.

It must be emphasized however, that the plaintiff contends that the equitable lien is a first mortgage and the later loan is a second mortgage. Therefore, the interests in the property owned by Steven H. Chang and Janet Chang shall contribute equally to the repayment of the $85,138.30 which the plaintiff paid to the Long Island Savings Bank. Only after that is paid, shall the second mortgage by Steven H. Chang be paid, out of the reminder of his interest.

The plaintiff's motion is granted, the answer defense and counterclaims asserted by the defendant Janet Chang are stricken, and the plaintiff shall have summary judgement on its first and second cause of action. A referee shall be appointed to compute the amount due as set forth above.

Settle order.

ARTHUR W. LONSCHIEN
J.S.C.

Supreme Court, U.S.
FILED
SEP 20 2000
CLERK

(2)

No. 00-278

IN THE

Supreme Court of the United States

JANET CHANG,

Petitioner,

v.

FIRST AMERICAN TITLE INSURANCE CO. OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX

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PRELIMINARY STATEMENT

The respondent, FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK (hereinafter "FIRST AMERICAN"), opposes JANET CHANG'S petition for a Writ of Certiorari.

The petitioner, JANET CHANG, petitions the United States Supreme Court for a Writ of Certiorari claiming a violation of the protections guaranteed under the Fourteenth Amendment of the United States Constitution. Specifically, she claims that she was deprived of property without due process, and denied equal protection of the laws as guaranteed by the Constitution.

JANET CHANG's petition should be denied. She was not deprived of property without due process or denied equal protection of the law. JANET CHANG was given a full and fair opportunity to contest all proceedings taken against her in the underlying foreclosure action and was treated by the New York Courts as any other litigant.

Specifically, JANET CHANG challenges - as unconstitutional - the decision of the Appellate Division of the Supreme Court of New York, Second Judicial Department, which denied her motion to enlarge her time to appeal. Even assuming that her application had merit, her motion was made *after* the time to perfect her appeal had expired. Under the New York Code, Rules and Regulations, an appeal is deemed abandoned unless perfected, or the time to perfect enlarged, within six months after the date of the notice of

appeal. The petitioner - through no fault of FIRST AMERICAN or the New York Courts - let her appeal lapse. She has no constitutional right to absolution for her own failure to perfect her appeal, or to obtain an enlargement of her time to do so before her appeal time expired. Moreover, even if her time to appeal was enlarged, it is unlikely that she would have prevailed on appeal, because her challenge to the respondent's right to an equitable mortgage under the long-recognized principle of "equitable subrogation" was without merit. In this regard, she was, indeed, afforded and did avail herself of appellate review of the substantive issues concerning "equitable subrogation" that were raised in the Court of original jurisdiction - New York's Supreme Court, Queens County. *Great Eastern Bank v. Chang*, 227 A.D.2d 589, 643 N.Y.S.2d 203 (2d Dept. 1996), *lv. to app. dismissed*, 88 N.Y.2d 1064, 674 N.E.2d 337, 651 N.Y.S.2d 407.

STATEMENT OF JURISDICTION

It is respectfully submitted that the Supreme Court should not exercise jurisdiction to review the denial by the Appellate Division of the New York Supreme Court (New York's intermediate-appellate-level court) of JANET CHANG's belated motion for an enlargement of time to perfect her appeal from a Judgment of Foreclosure and Sale.

Section 1257(a) of Title 28 of the United States Code provides in relevant part that

> (a). . . [f]inal] judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

> Court by writ of certiorari . . . where the validity of a statute of any State in drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . .

Id.

The highest court in New York is the Court of Appeals - not the Appellate Division of the Supreme Court. Therefore, this petition does not invoke the Supreme Court's jurisdiction. However, assuming (but not conceding) that the Appellate Division's denial of enlargement - itself not appealable to the Court of Appeals - was a final decree by the highest New York court "in which a decision could be had," the Appellate Division's rule that appeals be deemed abandoned unless perfected, or the time to perfect is enlarged, within six months of the date of the appellant's notice of appeal, is not repugnant to the Constitution, treaties, or laws of the United States.

Moreover, a Writ of Certiorari is not a matter of right but of judicial discretion. There are no compelling reasons to grant a Writ of Certiorari in this matter. New York court rules were reasonable and properly followed in the underlying foreclosure action. There is no conflict between different circuit court of appeals on issues raised by JANET CHANG. There is no important federal question that has been raised by JANET CHANG. There is no conflict between different states on any issue raised by JANET CHANG that must be determined by this Court. The petition, therefore, should be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The underlying action was brought to foreclose a first mortgage on real property located in New York, Queens County, known as 112-31 75th Avenue, Forest Hills, New York (hereinafter the "Mortgaged Premises").

(a) Background

STEVEN H. CHANG (hereinafter "STEVEN") and Hsu Chang were at one time the owners, as tenants-in-common, of the Mortgaged Premises. Hsu Chang died in 1982, leaving his undivided one-half interest to his wife - JANET CHANG.

In 1987, STEVEN borrowed $250,000.00 from GREAT EASTERN BANK (hereinafter "GREAT EASTERN") and delivered his promissory note acknowledging the debt. As collateral security for the payment of the debt, STEVEN delivered to GREAT EASTERN his mortgage under which he mortgaged his own undivided one-half interest as a tenant-in-common in the Mortgaged Premises. The Mortgage was duly recorded and the mortgage tax due under New York law was paid.

GREAT EASTERN's mortgage was intended to be a first mortgage. However, at the time of the closing of the mortgage-loan transaction, there existed on record a prior mortgage held by Long Island Savings Bank (hereinafter "LISB") which had been given by STEVEN and Hsu Chang. Accordingly, at the GREAT EASTERN mortgage closing a portion of GREAT EASTERN's mortgage loan proceeds - $85,138.30 - was used to satisfy LISB's mortgage thereby establishing GREAT EASTERN's first-mortgage lien. FIRST AMERICAN (a New York title insurance company) insured GREAT EASTERN that the mortgage loan to STEVEN was a first-mortgage lien. FIRST AMERICAN did not insure JANET CHANG - no contractual privity existed between them.

The LISB mortgage had been given in 1979 by the then co-owners of the real estate, STEVEN and Hsu Chang. When JANET CHANG succeeded to her husband's co-tenancy, his interest had been encumbered by the LISB mortgage.

(b) The Commencement of the Foreclosure Action

In 1991, STEVEN defaulted on the GREAT EASTERN mortgage loan, and GREAT EASTERN commenced the underlying foreclosure action in New York Supreme Court, Queens County, under New York's Real Property Actions and Proceedings Law. JANET CHANG served an Answer to the foreclosure complaint and asserted numerous affirmative defenses and counterclaims. In the main, JANET CHANG contested the validity of GREAT EASTERN's mortgage.

JANET CHANG was represented by the law firm of Berger & Kramer, LLP.

(c) Summary Judgment

In 1994, GREAT EASTERN moved, on notice, for summary judgment under Rule 3212 of New York's Civil Practice Law and Rules (hereinafter "CPLR"). JANET CHANG's attorneys opposed the motion and, indeed, cross-moved for summary judgment on her behalf. GREAT EASTERN argued that, even if the mortgage lien did not encumber JANET CHANGE's undivided interest, GREAT EASTERN it was entitled (i) to a first-mortgage lien, in the amount of the LISB mortgage, against JANET CHANG's and STEVEN'S unified interest as tenants-in-common under the doctrine of "equitable subrogation", and (ii) to a second-mortgage lien only against STEVEN's undivided interest as to the remainder of the amount owed to GREAT EAST-

ERN.[1] The theory being: JANET CHANG benefitted from GREAT EASTERN's satisfaction of the LISB mortgage to which GREAT EASTERN was equitably subrogated.

The motion and cross-motion were submitted to the Honorable Arthur W. Lonschein, Supreme Court Justice, Queens County, for determination. Justice Lonschein decided the motions in favor of the respondent, and held as follows:

> Plaintiff claims foreclosure not only as to the entirety of Steven H. Chang's interest, but also as to Janet Chang's interest, to the extent of the prior mortgage to the Long Island Savings Bank. As to this, it claims entitlement under the doctrine of equitable subrogation. In *King v. Pelkofski*, 20 N.Y.2d 326, the Court of Appeals adopted the formulation of the Restatement, Restitution, §162, that "where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder."

---

[1] The amount of the "second" mortgage was equal to the amount of the GREAT EASTERN loan less the amount of the equitable-first-mortgage lien.

Here, the mortgage to the Long Island Savings Bank was a lien on Janet Chang's interest in the premises. This lien was discharged using the plaintiff's money. In the court's opinion, it would be unjust to allow Janet Chang to retain the entire value of her interest, after the property is sold in foreclosure, free and clear of any obligation to repay that mortgage. Therefore, the court holds that the doctrine of equitable subrogation applies here, and Janet Chang's interest in the premises is available to satisfy the equitable lien created by the plaintiff's repayment of the Long Island Savings Bank mortgage.

It must be emphasized, however, that the plaintiff contends that the equitable lien is superior to the lien created to the mortgage given to Steven H. Chang, that the equitable lien is the first mortgage and latter loan is the second mortgage. Therefore, the interest in the property owned by Steven H. Chang and Janet Chang shall contribute equally to the repayment of the $85,138.30 which the plaintiff paid to the Long Island Savings Bank. Only after that is paid, shall a second mortgage by Steven H. Chang be paid out of the remainder of his interest.

The plaintiff's motion is granted, the answer, defenses and counterclaims asserted by the defendant, Janet Chang are stricken, and the plaintiff shall have summary judgment on its first and second

causes of action. A referee shall be appointed to compute the amounts due as set forth above.

Id.

(d) Janet Chang's First Appeal

The attorneys for JANET CHANG duly appealed from Justice Lonschein's determination to the Appellate Division of the Supreme Court, Second Judicial Department.

By Decision and Order dated May 28, 1996, a four-justice-appellate-panel unanimously affirmed Justice Lonschein's award of summary judgment holding:

> Steven Chang and his brother Hsu Chang acquired a residential condominium unit, and a mortgage on the property was held by Long Island Savings Bank. Upon his death, Hsu's wife, the appellant, succeeded to his interest in the unit and thereby became an owner of the unit with Steven as tenants in common. Thereafter, without the knowledge or consent of the appellant, Steven obtained a mortgage on the property from the plaintiff, Great Eastern Bank. After Steven defaulted on the mortgage payments, the plaintiff brought this action to foreclose on the mortgage given by Steven and also on the equitable lien created when it satisfied the Long Island Savings Bank mortgage.
>
> Where, as here, the funds of the mortgagee are used to discharge a prior lien upon the property of

> another, the doctrine of equitable subrogation applies to prevent unjust enrichment by subrogating the mortgagee to the position of the senior lienholder (see, *King v. Pelkofski*, 20 N.Y.2d 326, 333; *Wagner v. Maenza*, A.D.2d [2nd Dept., Jan. 22, 1996]; *Zeidel v. Dunne*, 215 A.D.2d 472; *Cohn v. Rothman-Goodman Mgt. Corp.*, 155 A.D.2d 579, 580). The Supreme Court properly concluded that the mortgage to Long Island Savings Bank created a lien against the appellant's interest and Steven's interest in the condominium. Accordingly, the appellant and Steven were obligated to contribute equally to the repayment of the equitable lien.
>
> The appellant's remaining contentions are without merit.

Id.

Accordingly, JANET CHANG was afforded and availed herself of the appellate process and was permitted to contest - on appeal - the award of summary judgment granted against her by the Queens County Supreme Court.

(e) The Order of the Appellate Division Was a Non-final Determination and Could Not Be Further Appealed to the New York Court of Appeals

Thereafter, JANET CHANG moved under §5602(a)(1)(i) of the CPLR for permission to appeal to the New York Court of Appeals from the Second Department's affirmance. CPLR §5602(a)(1)(i) provides that an appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. *Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division.* Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. *Such appeal may be taken*:

> 1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,
>
> (i) from an order of the appellate division which finally determines the action and which is not appealable as of right. . . .

Id. (emphasis added).

The order sought to be appealed to the Court of Appeals was not a final determination, and was not appealable as of right. CPLR §5601. The Appellate Division had merely affirmed the order granting the foreclosing mortgagee summary judgment, dismissing JANET CHANG's defenses and counterclaims, and directing the appointment of a referee to compute the amounts due to the plaintiff. The foreclosure action had not been finally determined. Further proceedings were necessary, and all the issues in the action had not been disposed of. CPLR §5611. Therefore, under New York's CPLR, JANET CHANG could not appeal further to the Court of Appeals. Her motion for leave to appeal was denied.

(f) The Referee's Hearing

On August 14, 1997, a referee's hearing was conducted by the court-appointed referee. JANET CHANG was present and had the opportunity to question witnesses, and to make a statement for the record regarding her objections to the foreclosure action.

The amounts due and owing to the plaintiff were undisputed and established by the documents admitted in evidence at the hearing. It was shown that $180,080.59 was owed on the "equitable-first" mortgage, and that $159,919.13 was owed on the "second" mortgage.

(g) The Entry of the Judgment of Foreclosure and Sale

After the Referee's hearing, a motion was made *on notice* to JANET CHANG for a Judgment of Foreclosure and Sale and confirmation of the referee's computation of the amounts due. The procedure followed in this regard was that which is prescribed in New York's Real Property Actions and Proceedings Law as it relates to foreclosure actions.

The Judgment of Foreclosure and Sale with notice of its entry was served upon JANET CHANG on October 7, 1998. JANET CHANG moved the Queens County Supreme Court to vacate the Judgment. Her motion was denied by Justice Lonschein. JANET CHANG also attempted to stay the attendant foreclosure sale by making separate motions before the Queens County Supreme Court and the Appellate Division. Both motions were denied.

(h) The Foreclosure Sale and Subsequent Proceedings

The foreclosure sale took place on December 4, 1998. JANET CHANG was an active bidder at the foreclosure sale, but an outside bidder purchased the property for $555,000.00. See Appendix A.

A referee's closing took place at which time JANET CHANG was represented by another attorney, Edward Odesser, who acknowledged receipt of the surplus monies ($169,188.09) due to JANET CHANG from the sale:

> Received from John R. Dietz, Esq., the Referee appointed by the Judgment herein, to make the sale

> of the premises therein described, the sum of *$169,188.09*, representing one-half of the surplus to be paid to defendant, Janet Chang, pursuant to the judgment, *but without prejudice to defendant Janet Chang's right to pursue the appeal of said judgment, or any other plenary action she may have against the plaintiff or others arising out of the subject matter of this action*. Chang acknowledges that she will not vacate the foreclosure sale. /s/ Edward Odesser Attorney for Janet Chang

Id. (emphasis added).

JANET CHANG - thereafter claiming that her new attorney had no authority to accept the funds - returned the $169,188.09 to the referee.

(i) Janet Chang's Appeal from the Judgment of Foreclosure and Sale was Dismissed Because She Abandoned It

JANET CHANG duly filed a notice of appeal from the Judgment of Foreclosure and Sale, but did not perfect her appeal within the time prescribed by the Court's rules - six months. CHANG did not perfect her appeal but instead moved - after the time to appeal expired - for an extension of time. The Appellate Division, Second Department, denied her motion and, thereafter, denied her motion to reargue. See Appendix B.

Simply stated, JANET CHANG allowed her appeal to lapse. She did not comply with the rules of the Appellate Division which provide as follows:

> (d) Enlargements of Time.
>
> (1) . . . [A]n enlargement of time to perfect an appeal, action or proceeding, or to serve and file a brief, may be granted, upon good cause shown, only upon motion on notice to all parties.
>
> * * *
>
> (e) Notwithstanding any of the provisions of this Part, a civil appeal, action, or proceeding shall be deemed abandoned unless perfected
>
> (1) within six months after the date of the notice of appeal, order granting leave to appeal, or order transferring the proceeding to this court . . . unless for good cause shown an order shall have been entered on motion extending the time to perfect. The clerk shall not accept any record or brief for filing after the expiration of such six-month period.

22 N.Y.C.R.R. §678.8.

In New York, these rules apply to *all* litigants - not just JANET CHANG. She had six months to perfect her appeal, or to secure an enlargement of her time to do so. She did neither. Instead, she moved to revive an already abandoned appeal. Her belated motion was denied and her appeal dismissed. JANET CHANG alleges that the Appellate Divi-

sion's refusal to revive the abandoned appeal was a violation of due process and equal protection. However, she cannot successfully argue this point in light of her own failure to follow the procedural rules governing the appellate process. Moreover, even if her motion to enlarge was timely, she was not automatically entitled to enlargement. She was still required to show "good cause" for the enlargement. Accordingly, the Appellate Division still had the discretion to deny the motion on lack of good cause, even if timely made.

(j) Motions After Enlargement of Time Was Denied

JANET CHANG then moved the New York Court of Appeals for permission to appeal the Appellate Division's denial of time-enlargement. Section 500.11(d)(iv) of the Rules of the Court of Appeals provides that the movant must showthat this court has jurisdiction of the motion and of the proposed appeal, including that the order of judgment sought to be appealed from is a *final determination* or comes within the special class or non-final orders which are appealable by permission of the Court of Appeals (CPLR 5602[a][2]).

22 N.Y.C.R.R. §500.11(d)(iv) (emphasis added).

The Appellate Division's Order denying time-enlargement was not a final determination and was not one of the non-final orders appealable by permission pursuant to CPLR §5602(a)(2). See Cohen, *Powers of the New York Court of Appeals*, § 80 *et. seq*. (rev.ed. 1951). JANET CHANG's motion for leave to appeal to the Court of Appeals was denied. She then moved to reargue, and that motion was denied as well.

She now petitions the United States Supreme Court for a Writ of Certiorari. Her petition should be denied.

POINT I

JANET CHANG WAS NOT DENIED DUE PROCESS

The Fourteenth Amendment to the United States Constitution guarantees due process and equal protection. The Fourteenth Amendment states that no state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law. Due process is a concept dealing with the procedures necessary to assure fairness and neutrality in actions taken by the government. The constitutional limitations and prohibitions embodied in the Fourteenth Amendment apply to state or federal activity and not to purely private activity.

To invoke the Fourteenth Amendment, the Supreme Court must first determine the existence of "state action" because the action inhibited by the Fourteenth Amendment is only such action as may fairly be said to be that of the state's. The Fourteenth Amendment erects no shield against private conduct, however discriminatory or wrongful. *Blum v. Yaretsky*, 457 U.S. 991, 73 L.Ed.2d 534, 102 S.Ct. 2777 (1982). For example, in *Flag Brothers, Inc. v. Brooks*, 436 U.S. 149, 56 L.Ed.2d 185, 98 S.Ct 1729 (1978), the Supreme Court held that no state action was involved in the sale of goods taken to a warehouse for storage after the plaintiff was

evicted. The Court rejected the argument that the sale was attributable to the state because the state authorized it by enacting the Uniform Commercial Code. A state's mere acquiescence in a private action does not convert that action into that of the state. In the instant case, the fact that JANET CHANG's interest in real property was foreclosed under New York law does not mean that state action was involved in depriving her of her interest. Accordingly, JANET CHANG cannot establish that state action was involved which allegedly deprived her of property without due process.

Turning to the question of the Appellate Division's denial of time-enlargement, it should be noted that the guaranty of due process demands only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the subject sought to be attained. *Nebbia v. New York*, 291 U.S. 502, 78 L.Ed.2d 940, 54 S.Ct. 505 (1934). The due process clause guards only against a purposeful abuse of power, not mere negligence. *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986).

In determining whether a person's Fourteenth Amendment rights were violated, the Supreme Court will not consider whether a state court misapplied its own law. *Estelle v. McGuire*, 502 U.S. 62, 112 Sup.Ct. 475, 111 L.Ed.2d 385 (1991). JANET CHANG cannot be heard to complain - on constitutional grounds - that the respondent should not have been afforded an equitable mortgage based upon the doctrine of equitable subrogation.

In the instant case, JANET CHANG was afforded every opportunity to contest the proceedings taken against her in the underlying foreclosure action. She was represented by a law firm at the commencement of the foreclosure action and when she contested the motion for summary judgment. Her attorneys perfected and prosecuted an appeal to the Appellate Division, Second Department. JANET CHANG was thereafter represented in the foreclosure action by another lawyer, Edward Odesser. JANET CHANG realized, but rejected, in excess of $169,000.00 from the sale of the Mortgaged Premises.

Aside from the appeal which she *did* perfect, she filed a notice of appeal from the Judgment of Foreclosure and Sale. However, she failed to perfect the appeal within the six month time limit provided by the Court's Rules. She cannot be heard to complain - on constitutional grounds - that the Appellate Division, or any New York Court, deprived her of life, liberty and property without due process, by denying her belated request for an enlargement of time to appeal. Simply stated, JANET CHANG did not follow the reasonable procedures outlined by the Court's rules - those were: perfect an appeal, or apply for and obtain an enlargement of the time to appeal, within six months of the date of her notice of appeal.

Indeed, a period of six months within which to perfect an appeal is not unreasonable, nor too short a period of time within which to perfect. She was not entitled - on constitutional grounds - to an enlargement.

In summary, the New York Courts, on all levels (Court of Appeals, Appellate Division and Supreme Court), entertained numerous motions made by JANET CHANG in her effort to contest the underlying foreclosure action. And, JANET CHANG cannot avail herself of appellate review on the substantive issues regarding "equitable subrogation". She cannot complain - on constitutional grounds - because she was unsuccessful.

JANET CHANG was accorded due process in all respects.

POINT II

JANET CHANG WAS AFFORDED EQUAL PROTECTION UNDER THE LAW

The Fourteenth Amendment to the Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The equal-protection clause directs that all persons similarly situated should be treated alike and affords a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others. In essence, equal protection means that all persons similarly situated should be treated alike, and that no person or class of persons shall be denied the same protection under the laws enjoyed by others in similar circumstances. *Califano v. Westcott*, 442 U.S. 682, 61 L.Ed.2d 176, 99 S.Ct. 2545 (1979).

Equal protection analysis is said to be two-tiered. There must be a "rational basis" for any classification, requiring the person challenging the statute to show that no legitimate state goals are advanced by the classification. *Dandridge v. Williams*, 397 U.S. 471, 487, 25 L.Ed. 491, 90 S.Ct. 1153 (1970). However, when the law being challenged applies to suspect classifications (for example, race, alienage and national origin) or fundamental rights (for example, freedom of speech and religion, the right to travel, the right to vote, and the right to divorce, procreation and marriage) the law must pass a "strict scrutiny" test. That is, equal protection is violated unless the classification is necessarily related to a compelling state interest and is narrowly tailored to meet that compelling state interest. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L.Ed.2d 520, 96 S.Ct. 2562 (1976).

One who makes an equal protection challenge must overcome a strong presumption of constitutionality.

There is no denial of equal protection by a course of procedure that is applied to legal proceedings in which a particular person is affected if such a course would also be applied to any other person in the state under similar circumstances and conditions. *Tinsley v. Anderson*, 171 U.S. 101, 43 L.Ed. 91, 18 S.Ct. 805 (1898). Moreover, it has been held that there is no constitutional right or entitlement to free legal counsel in a private, civil action, or to the effective assistance of counsel in such an action. See, *Reese v. Owens-Corning Fiberglass Corp.*, 221 F.3d 1352 (10th Cir. 2000), 2000 WL 963333 (July 12, 2000), *MacCuish v. United*

States, 844 F.2d 733 (10th Cir. 1988), *McGee v. McGee*, 180 Misc.2d 575, 583, 694 N.Y.S.2d 269, 276 (Sup.Ct. Suffolk Co. 1999).

Furthermore, the guaranty of equal protection does not insure uniformity of judicial decisions. *Milwaukee Electric Rail & Light Co. v. Wisconsin*, 252 U.S. 100, 64 L.Ed. 476, 40 S.Ct. 306 (1920). A person is not deprived of equal protection of the laws if a state court departs from the precedence established in earlier decisions. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U.S. 54, 62 L.Ed. 145, 38 S.Ct. 40.

Finally, the equal protection guaranty does not require an appeal in a particular type of proceeding, or in some particular situation, if all persons within the class are treated alike. *Butterfield v. Rudde*, 58 N.Y. 489 (1874).

JANET CHANG was treated like any other litigant, and had the opportunity to, and did, retain the services of two different attorneys to represent her. She also apparently had the wherewithal to pay for the legal services of a private attorney.

POINT III

THE DOCTRINE OF "EQUITABLE SUBROGATION" HAS LONG BEEN RECOGNIZED IN NEW YORK AND WAS CORRECTLY APPLIED TO AFFORD THE RESPONDENT AN EQUITABLE MORTGAGE LIEN

Under the doctrine of equitable subrogation, FIRST AMERICAN (successor in interest to GREAT EASTERN) stepped into the superior position once held by LISB to the extent of the money GREAT EASTERN disbursed to satisfy that mortgage. *Great Eastern Bank v. Chang*, 227 A.D.2d 589, 643 N.Y.S.2d 203 (2d Dept. 1996), *lv. to app. dismissed*, 88 N.Y.2d 1064, 674 N.E.2d 337, 651 N.Y.S.2d 407. See *Coronet Capital Co. v. Spodek*, 265 A.D.2d 292, 696 N.Y.S.2d 191 (2d Dept. 1999), *Federal Nat'l Mortgage Assoc. v. Woodbury*, 254 A.D.2d 182, 679 N.Y.S.2d 116 (2d Dept. 1998).

"Under the doctrine of equitable subrogation, when the circumstances are appropriate, one who pays the debt of another steps into the shoes of the creditor and takes the position, rights and remedies of that creditor - including its priority over junior creditors and liens". Heffernan, *Equitable Subrogation: No-So-Secret Defense Weapon*, Title News, July-August 1994, at 6.

The seminal case in New York is *King v. Pelkofski*, 20 N.Y.2d 326, 282 N.Y.S.2d 753, 229 N.E.2d 435 (1967), in

which the Court of Appeals adopted the Restatement on Restitution as a basis for remedying unjust enrichment. The Court of Appeals stated the following:

> Turning to the core question, that of subrogation, the governing principle has been states as follows: Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances, that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder. (Restatement, Restitution, § 162).

282 N.Y.S.2d, at 757-58. The purpose of the doctrine is to compel the ultimate payment of a debt by one who in justice, and good conscience ought to pay it. *Korea Commercial Bank of New York. v. Ianos*, 236 A.D.2d 249, 653 N.Y.S.2d 561 (1st Dept. 1997).

In *King v. Pelkofski*, the plaintiff commenced an action to foreclose its mortgage. The defendant, Joseph Pelkofski, was not the owner of the property. Pelkofski's wife (the true owner) interposed an answer alleging that the mortgage was void. However, with the proceeds of the plaintiff's loan a prior mortgage affecting the real property which had been executed by both Pelkofski and his wife had been satisfied. The Court of Appeals held that the plaintiff-mortgagee was entitled to be subrogated to the rights of the prior mortgagee, whose lien was senior to the wife's interest in the property

and which lien had been discharged by the proceeds of plaintiff's loan. Plaintiff was also entitled to priority for all funds advanced at the closing to satisfy obligations of Pelkofski's wife. See also, *Whitestone Savings and Loan Association v. Moring*, 286 A.D. 1042, 145 N.Y.S.2d 335 (2d Dept. 1955); *Union Savings Bank of Patchogue v. Dudine*, 40 Misc.2d 155, 242 N.Y.S.2d 692 (Sup.Ct. Suffolk Co. 1963).

The court in *Boston Trade Bank v. Kuzon*, 154 Misc.2d 217, 584 N.Y.S.2d 994 (Sup.Ct. N.Y.Co. 1992), articulated the doctrine of equitable subrogation as follows:

> In New York, by statute the priority of mortgage liens are determined by the order in which same are recorded. This procedure, known as race-notice, gives priority to the lienor who lacks knowledge of the outstanding lien and wins the race to record. However, there are situations where priority established under the aforementioned race-notice statute may be set aside by a court, dependent upon principles of justice and equity as applicable to a particular situation. In appropriate circumstances, a court in equity will subrogate the rights of the subsequent lienholder so as to place such a creditor into the shoes of a prior creditor. The doctrine of equitable subrogation plays upon notions of fairness to preclude situations where a party might be unjustly enriched by

> the acts of another in discharging an existing lien, placing another unknown lienholder in a superior position.

584 N.Y.S.2d, at 996 (citations omitted).

In *Brown v. Bellamy*, 170 A.D.2d 876, 566 N.Y.S.2d 703 (3d Dept. 1991), the court recognized that the doctrine of equitable subrogation has been extended rather than restricted. 566 N.Y.S.2d, at 704. The rule adopted in *King v. Pelkofski* has been applied to numerous situations where there has been unjust enrichment. The Court of Appeals *did not* limit the application of equitable subrogation to the facts of that case. The doctrine has been applied in various forms to avoid unjust enrichment.

In *Wainco Funding v. Barral*, N.Y.L.J. September 17, 1991, at 5, col. 3 (Sup.Ct. Queens Co.), the holder of a third mortgage whose proceeds were used to satisfy in full the first mortgage on the property sought to apply equitable subrogation to defeat the priority of an intervening second mortgage which had been recorded but was unfortunately not revealed in the third mortgagee's title search. The third mortgagee argued that even though the intervening second mortgage had been recorded first the third mortgagee *believed* that it would have priority over all others. It became apparent that it was mistaken. The court applied equitable subrogation even though the third mortgagee had constructive notice of

the intervening lien and had mistakenly believed that it would have priority.

In *G.B. Seely's Son, Inc. v. Fulton-Edison, Inc.*, 52 A.D.2d 575, 382 N.Y.S.2d 516 (2d Dept. 1976), a tenant was subrogated to the rights of a mortgagee as against the tenant's landlord to the extent of the tenant's payment of the mortgage. The court further recognized that the doctrine is equitable in nature and does not rest upon any right acquired by contract but simply upon the equitable principle that substantial justice should be attained regardless of form. 382 N.Y.S.2d, at 520.

In *Ellenville National Bank v. Shangri La Hotel, Inc.*, 56 Misc.2d 653, 289 N.Y.S.2d 670 (Sup.Ct. Ulster Co. 1967), the court held that a defendant in a foreclosure action who made a gratuitous payment of tax arrears, which were superior liens upon the property being foreclosed, was entitled to equitable subrogation in order to prevent an unjust enrichment.

As is supported by the authorities cited above, the doctrine of equitable subrogation has been recognized by all New York Courts and has been applied in diverse ways in order to remedy unjust enrichment. It was similarly and correctly applied in JANET CHANG's case as well.

CONCLUSION

JANET CHANG is not entitled to review by the United States Supreme Court of this matter. She cannot be heard to complain - on constitutional grounds - that she was unsuccessful in her State Court challenge of the application of the doctrine of equitable subrogation. More importantly, JANET CHANG was given every opportunity to contest all proceedings. The New York Courts entertained all of her numerous motions. She obtained appellate review of the determination of the substantive legal issues. She *had* the benefit of counsel at various states of the proceedings. She personally appeared and contested the proof offered on the amount of the underlying liens. She was permitted to bid at the foreclosure sale. She was offered the surplus money she was entitled to, but she rejected it. Her rights as a litigant were protected. The Constitution does not guaranty a victory - only the opportunity to be treated equally and fairly, and to be heard. JANET CHANG was treated like any other litigant and was afforded the right to be heard. Her petition should be denied.

Respectfully submitted,

FLOYD G. GROSSMAN, ESQ.
Counsel of Record
MICHAEL J. SPITHOGIANNIS, ESQ.
DOLLINGER, GONSKI & GROSSMAN
One Old Country Road
Carle Place, New York 11514
(516) 747-1010
Attorneys for Respondent

Appendix A

APPENDIX A- SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
CORNELIUS J. O'BRIEN
THOMAS R. SULLIVAN
GLORIA GOLDSTEIN, JJ.

98-10381

DECISION & ORDER ON MOTION

First American Title Insurance Company of New York, etc., respondent, v. Steven H. Change, et al., defendants, Janet Chang, appellant.

Motion by the appellant to recall and vacate a decision and order of this court dated June 4, 1999, which dismissed an appeal from a judgment of the Supreme Court, Queens County, pursuant to 22 NYCRR 670.8(e) for failure to timely perfect the same, to reinstate the appeal, and to enlarge the time to perfect the appeal.

Appendix A

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, P.J., O'BRIEN, SULLIVAN, and GOLDSTEIN, JJ., concur.

ENTER:

Martin H. Brownstein

Clerk

August 20, 1999

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK v CHANG

Appendix B

APPENDIX B- SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS

Index No. 28451/92

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

STEVEN H. CHANG, et al.,

Defendants.

REFEREE'S REPORT OF SALE

Appendix B

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS

I, JOHN R. DIETZ, the Referee appointed by the judgment entered in this action bearing date the 10th day of September, 1998, to make the sale of the mortgaged lands and premises therein particularly described, do respectfully report as follows:

FIRST.- That I caused due notice of the sale of the said lands and premises by me at public auction on the 4th day of December, 1998 at 11:00 o'clock in the forenoon, to be given and published according to law and the rules and practice of this Court, as will fully appear by the affidavits hereto annexed.

SECOND.- That at the time and place for which the sale was noticed as aforesaid, I attended in person, and, agreeably to such notice, offered the said mortgaged lands and premises for sale to the highest bidder, and sold the same to WILLIAM GRIMES for the sum of $555,000.00 that being the highest sum bid therefor, and received $55,000.00, ten percent of said sum.

THIRD.- That I have received from such purchaser the balance of the said purchase money, to wit: the sum of $500,000.00.

FOURTH.- That I have paid out of the said purchase money the sum of $1,512.94 for taxes which were liens on

the said mortgaged premises at the time of such sale, and for which receipts are hereto annexed.

FIFTH.- I deposited the balance of said purchase money in Marine Midland Bank.

SIXTH - That I have drawn from the moneys so deposited, and retained for my fees, the sum of $500.00

SEVENTH.- I have disbursed for advertising expenses, as shown by bills hereto annexed, the sum of $1,313.40.

EIGHTH.- I have paid to the attorney(s) for the plaintiff(s) the sum of $1,420.94 for the costs together with interest.

NINTH.- I have paid to the attorney(s) for the plaintiff(s) for the sum due on the equitable first mortgage upon which this action was brought, and directed to be paid by said judgment, the sum of $201,747.79 for which a receipt is hereto annexed.

TENTH- That I have made, executed and delivered to such purchaser a good and sufficient deed of conveyance for the said mortgaged premises so sold.

ELEVENTH- Pursuant to the terms of the Judgment, surplus monies, if any, out of the foreclosure Sale after the payment of the first mortgage shall be divided equally between plaintiff, as the second mortgagee of the interest of defendant, STEVEN CHANG ($159,919.13 with interest from August 14, 1997) and defendant, JANET CHANG,

without the necessity of the holding of a surplus money proceeding. A calculation of the foregoing distribution is annexed hereto.

TWELFTH- There remains upon deposit in the aforementioned depository to the credit of this action, surplus moneys to the amount of $0.00 subject to the order of this court, as appears by the annexed voucher.

Annexed hereto and made a part of this, my report, is a statement showing the several items aforesaid and the mode of computation

All of which is respectfully submitted.

Dated: February 23, 1999

/s/_____

JOHN R. DIETZ Referee

STATEMENT

Amount due on the equitable mortgage, as per judgment.. ..... $180,080.59

Interest from 8/14/97 to date (1/4/99) ..... $ 21,667.20

$201,747.79

Appendix B

Amount of Purchase Money	$555,000.00
Paid for taxes	$1,512.94
Referee's fees	500.00
Advertising expenses	1,313.40
Plaintiff's costs and allowance with interest	1,420.94
Guardian's costs	0.00
Tax stamps on deed	2,220.00
Amount allowed plaintiff(s)	201,747.79
Legal fee per Judgment	0.00
New York City Transfer Tax	7,908.75
Total	$216,623.82

Balance being amount paid plaintiff(s) on account of claim (Equitable Mortgage)$201,747.79

Subtotal Remaining: $338,376.18

Fifty (50%) Balance to Plaintiff....$169,188.09

Fifty (50%) Balance to Defendant, JANET CHANG $169,188.09

Deficiency-Surplus $ 0.00

Dated: February 23, 1999

Appendix B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

STEVEN H. CHANG, et al.,

Defendants.

Received _____ from JOHN R. DIETZ, Esq., the Referee appointed by the judgment herein, to make the sale of the premises therein described, the sum of $1,313.40 for advertising expenses, $1,429.94 in full for the costs, with interest, awarded plaintiff(s) by the said judgment, and also $201,747.49, including interest, the sum due plaintiff on the equitable mortgage upon which this action was brought, and directed to be paid to plaintiff by said judgment, and the sum of $169,188.09, representing one-half of the surplus to be paid to plaintiff pursuant to the judgment arising out of plaintiff's second mortgage against the interest of defendant, STEVEN CHANG.

DOLLINGER, GONSKI & GROSSMAN
By:/s/
FLOYD G. GROSSMAN Attorney(s) for Plaintiff(s)

Appendix B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

STEVEN H. CHANG, et al.,

Defendants.

State of New York, County of ss:

JOHN R. DIETZ, being duly sworn, deposes and says:

That he is the referee duly appointed herein to make the sale in the above entitled action, and the officer who made such sale.

That the above report of sale signed by him is in all respects true and correct, and said report and statement annexed thereto contain a true, accurate and complete report of the disposition of the proceeds of such sale.

Sworn to before me this
23 day of February, 1999

/s/
JOHN R. DIETZ, Referee

Appendix B

/s/
Notary Public

SCOTT J. SOSKIN
Notary Public, State of New York
No. 41-4835656
Qualified in Queens County
Commission Expires: Jan 31, 2000

Appendix B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FIRST AMERICAN TITLE INSURANCE
COMPANY OF NEW YORK,

Plaintiff,

-against-

STEVEN H. CHANG, et al.,

Defendants.

Received from JOHN R. DIETZ, ESQ., the Referee appointed by the Judgment herein, to make the sale of the premises therein described, the sum of $169,188.09, representing one-half of the surplus to be paid to defendant, JANET CHANG, pursuant to the judgment, but without prejudice to defendant JANET CHANG's right to pursue the appeal of said judgment, or any other plenary action she may have against the plaintiff or others arising out of the subject matter of this action. CHANG acknowledges that she will not vacate the foreclosure sale.

/s/
EDWARD ODESSER
Attorney for JANET CHANG
Index No. 28451/92

Appendix B

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK

Plaintiff,

-against-

STEVEN H. CHANG, et al.

Defendants.

Referee's Report of Sale

Supreme Court, U.S.
FILED
OCT 4 - 2000
CLERK

(3)

No. 00-278

In The

Supreme Court of the United States

JANET CHANG,

Petitioner,

vs.

FIRST AMERICAN TITLE INSURANCE CO. OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of State Of New York Appellate Division, Second Dept.

REPLY TO BRIEF IN OPPOSITION

JANET CHANG, Pro se
947 FOX MEADOW ROAD
YORKTOWN, NY 10598
PHONE: (914) 245-9690

13pp

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I. U.S. SUPREME COURT HAS JURISDICITON

Contrary to FATIC's assertion, the district court's part in the foreclosure sale of the property was not mere acquiescence in a private action. The court had taken affirmative action to make it possible for the FATIC to foreclose and the court appointed a referee to conduct the sale. "Judicial action in private disputes is a form of state action required for application of this clause prohibiting state from denial of equal protection of its law to any person. *Hosey v. Club Van Cortlandt,* DCNY 1969, 299 F. Supp. 501; See also *Edward v. Habib,* 397 F.2d 687, cert. denied, 89 S. Ct. 618.

28 USCA Judiciary and Judicial procedure Sec. 1257, commentary on 1988 revision by David D. Siegel stated "Note that the section allows certiorari to review not just a decision of the highest court of the state, but of the highest state court 'in which a decision could be had'. That language, contained in the old section and repeated in the new, takes note of the internal strictures a state may impose on appeals within its own court system, perhaps stopping a case at some lower level and barring it from review by the state's highest court, for that matter, from any appellate court at all. If that case nevertheless poses a federal question, review of it can be applied for to the U.S. Supreme Court – solely by Certiorari route, of course – from whatever court it has been able to reach within the state system." The "time period" was the requirement I did not meet, the case would not be appealable under state law within the State Court system; it can still reach the highest court in the land through the good office of Sec. 1257. (See *Grovey v. Townsend,* 55 S. Ct. 622).

Liberty to manage one's own affairs as one chooses and freedom from invasion of one's contractual rights, and property rights are protected by constitution. Both rights were invaded and abridged, which raises a federal question. In reviewing the case, the Court could resolve the conflict of opinion between the Queens district court's ruling and the opinion of *Universal Title Ins. Co.*, 942 F.2d 1311 and *Coy v. Raabe*, 418 P.2d 728, on the question of whether a "mistake" by professionals like bankers or title insurers should permit them to claim the right of subrogation. Especially a title insurer for the purpose of subrogation. *Universal* and *Raabe* Courts stated that they should be subject to liability for breach of a legal duty while the Queens court in our case would excuse the mistake and permit subrogation rights. A definitive ruling on these questions related to subrogation rights in general and that of a title insurer in particular would serve public interest.

II: DUE PROCESS AND EQUAL PROTECTION

"The right to make contracts about one's affairs is a part of the liberty protected by the due process clause." See *Morehead v. Tipaldo*, 298 U.S. 587. The interference into my existing mortgage right did destroy my privilege to pay it off in small monthly installments and the over-encumbrance of the entire property had led to the loss of my old age retirement home. The delinquent title insurer took $386,246 from the proceeds of the sale, making a profit of nearly $190,000. FATIC is continuing to extort an additional $12,576 – half of the funds in the receiver's hand, in spite of the fact that the Referee's report stated

no deficiency and FATIC did not comply with the judgement order to file for deficiency proceeding within the allowed time. The so-called surplus money of $169,000 left for Petitioner after paying taxes and legal debts would not even be enough to buy a one bedroom condo in Forest Hills.

If equal protection means that all persons receive the same treatment, then let me ask, were all parties in our case treated alike?

a) consider the desire of both co-tenants of equal share in a property to be of equal importance, so as not to allow one's desire to diminish the rights of the other? The case of *First American Title Ins. Co. of N.Y. v. Kevlin*, 610 NYS 2d 361 demonstrated that when two cotenants were extended equal protection, the non-consenting one was not penalized for the other's fault. I was not protected when the court struck down my defense and counterclaim where ample documents were offered to prove that the lender assumed the risk with knowledge when it could bypass a danger and chose a safer alternative by walking away from Steven.

b) consider the arguments of both plaintiff and defendant to be equally credible and worth investigation in a trial to determine the equities, faults and liability of all? Summary Judgement for the plaintiff was not the proper device to allow full and fair opportunity to defend my property and contractual rights. In the *Kevlin* case the summary judgement was only against the borrower.

c) consider the inequality of the knowledge, skills and financial resources between a large

law firm (with specialized experts, super research facility and staff backed by rich title insurer's money) and a frightened pro se lay litigant?

d) The Ninth Amendment makes it possible to include some rights when it is considered basic and deserving of protection even if it was not enumerated in the Constitution. It is good public policy to establish affirmative action where a disadvantaged defendant's fundamental rights were threatened and the lack of money to obtain counsel would work injustice. New protective devices had appeared when needs arose, new rights for court appointed counsel for defendant in criminal case eventually became a reality.

I did everything I could to assert a claim against FATIC after I had to continue pro se. But my effort was so ineffective that the court could not see the injustice in allowing FATIC to receive a windfall. "The right to be heard would be of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law"; a layman "lacks the skills and knowledge to prepare his defense, even though he had a perfect one. He requires a guiding hand of counsel every step of the way" as stated in *Powell v. Alabama*, 287 U.S. 45 at 68-69. It would be too big a strain on the State's purse to appoint counsel for all poor defendants in civil cases. But in the case of foreclosure (with irreversible harm) where the unfair advantage of big money like insurer can overwhelm a poor individual, resulting in unjust and catastrophic outcome, it is not too much to request effective protection.

III. ON SUBROGATION

The object of Subrogation is to serve justice. This right adapts all the maxim of Equity: superior equity, free from fault, and requiring fair result. It applies where dictated by equity, justice, and good conscience as well as by public policy (See 83 CJS Subrogation Sec. 6.)

In citing Herfferman, Equitable Subrogation, FATIC neglected to note that the determining factor is the phrase "when the circumstances are appropriate". The cases cited in the opposition brief were distinguished from our case as their "circumstances" were quite "appropriate," and there was no interference with a third party existing contract or slandering of her property title. Here, FATIC chose again to ignore the clause "circumstances" in Restatement, Restitution Sec. 162 Comment (b),

> "b. **Circumstances** giving rise to subrogation. Where a person discharges an obligation owed by another, or a lien upon the property of another, and does so officiously, he is not entitled to reimbursement from the other (see Sec. 2), and is not entitled to be subrogated to the position of the obligee or lien-holder. In such a case it is true that as a result of the payor's act the other is enriched, but the enrichment is not unjust. . . . "

Restatement, Restitution Sec. 2 states that a person who officiously confers a benefit upon another is not entitled to restitution therefor. The rule has the effect of penalizing those who thrust benefits upon others and protecting persons who have had benefits thrust upon them.

I objected perhaps too much in my Petition against GEB/FATIC in their claiming to be subrogated. GEB became an intermeddler through its reliance on FATIC's faulty certification. GEB had willingly paid the whole amount when the mortgage was allowed until year 2007 to be paid up and there was no notice or even indication of default. The discharge of my mortgage debt was objected by me and the property was under no threat; nevertheless, GEB destroyed the security by which a widow and 3 orphans could preserve their property rights. It was a tortious intrusion.

"Party may under NY Law, be subrogated to claim of another only when it pays the other's debt under compulsion or for protection of some interest of party making payment." *MacMilliam Inc. v. Fed. Ins. Co.*, 741 F. Supp 1079. See also *In re Standardo*, 991 F.2d 1089. Circumstances allowed such rights were only when payment was in response to actual threat, as out of obligation, not of voluntary good will. *Weir v. Fed. Ins.*, 811 F.2d 1387. The rights are not for an intruder, as in *Mort v. U.S.*, 86 F.3d 890, *Qualicare-Walsh v. Ward*, 947 F.2d 823.

Please refer to *Universal Title Ins. Co.*, 942 F.2d 1311 and *Coy v. Raabe*, 418 P.2d 728; in my petition brief (on Page 19) I quoted the objection of two courts to the title insurer's claim to subrogation right. They consider it to be a gross misapplication of the doctrine to allow title insurer to automatically settle into it, because title insurance is a commercial transaction involving consideration and the title insurer's relationship is governed by contracts. The Universal Court also pointed out that "it is difficult to think of a situation in which a title insurance

company could not claim unjust enrichment as to someone who might inadvertently benefit by their negligence. Either they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation." In *Lawyers Title Ins. Corp. v. Research Loan & Inv. Corp.*, 361 F.2d 764 the court held "Usually the very purpose and essence of the title insurance transaction is to obtain a professional title search, opinion and guarantee. The policy of title insurance is in the nature of a Warranty." Competency of performance is an important element of a service undertaken.

FATIC must be aware of its problem so that it tried to use the words "purchase" and "assignment". Why FATIC would not do for me what it did for Mrs. Kevlin in *First American Title Insurance Co. of N.Y. v. Kevlin*, 610 NYS 2d 361, where FATIC severed its claim against a non-consenting co-tenant, a summary judgement for foreclosure sale was allowed against only her co-tenant.

There are authorities stating that FATIC could not escape liability by making its payment on policy to be an assignment, my early brief (on Page 26 and 27) cited 78 NY Jur.2d, Mortgage. Sec. 325 on the "assignment". In addition, please note the following federal opinion and the opinion from other state courts.

As stated by the court in *Meyer v. Bank of America Nat. Trust & Savings Ass'n*, 77 F.2d at 1085, an assignment of an assignable cause of action is a form of "subrogation" and neither a written or oral contract is necessary to effect transfer of such rights and formal written assignment of claims adds nothing to the enforceability of cause of action by assignee; an assignee's cause of action is subject

to the same defense as though no assignment thereof had been made; the court, citing ". . . . in *60 C. J.*, p. 749, with reference thereto should be noted, to-wit: 'While the creditor may properly make an assignment of his rights and remedies to the surety where the surety is entitled to be subrogated, the completion of the surety's subrogation, and his right to pursue the rights and remedies of the creditor, is not dependent on the willingness of the latter to make an assignment . . . if the surety is not entitled to subrogation, an assignment by the creditor will be ineffectual to give surety a right to subrogation he would not otherwise have.' " The court also referred to *American Surety Co. of N.Y. v. Lewis State Bank*, 58 F.2d 560 and *American Bonding Co. of Baltimore v. State Savings Bank*, 133 P.367 as illustration. If insurers have no right to subrogate, their position is not improved by the assignment to them of the insured's claim. Any right of recovery against third parties for money paid by insurers under the contracts must rest solely upon a weighing of the equities as between the third parties and insurers. Such equity generally depends upon participation in the original wrong. (*American Surety Co. v. Bank of California*, 133 F.2d 160.)

CONCLUSION

This case presents serious issues affecting many home and property owners as well as litigators. Petitioner respectfully requests this court grant Certiorari to review the issues.

Respectfully submitted,

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